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No. 00-701

In The

# Supreme Court of the United States

THE CITY OF SIMI VALLEY,

*Petitioner,*

v.

PHILIP YOUNG,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF OUT OF TIME AND BRIEF OF 211 ALPINE STREET, LLC, AS AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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## MOTION FOR LEAVE TO FILE AMICUS BRIEF OUT OF TIME

Comes now 211 Alpine Street, LLC, and moves this Court for leave to file a brief out of time as amicus curiae in opposition to the petition for writ of certiorari in this action. The circumstances giving rise to this motion are set forth below.

Amicus is a plaintiff in a lawsuit presently pending in the United States District Court for the Central District of California against the City of Los Angeles.[1] On Friday, December 29, 2000, undersigned counsel learned for the first time that the City of Los Angeles recently filed an amicus curiae brief in this Court in the current case in support of issuance of a writ of certiorari. This factor is extremely significant to 211 Alpine Street because it is presently locked in litigation with the City of Los Angeles under circumstances almost exactly identical to those presented in *City of Simi Valley v. Philip Young*. Specifically, the City of Los Angeles, like the City of Simi Valley, allows so-called "sensitive uses" which come into existence for the first time only *after* an adult business applicant has filed its relevant permit applications, to defeat the adult business' permit application. That is in fact what happened in the current district court litigation between amicus 211 Alpine Street and amicus City of Los Angeles.

Specifically, 211 Alpine Street had filed building permit applications for a live entertainment adult business

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[1] *211 Alpine Street, LLC v. City of Los Angeles*, C.D. Cal. No. 00-8791 ER (AJWx).

use in connection with property it had purchased at a cost of more than a million dollars. It made this purchase only after carefully checking for, and insuring compliance with, the City's zoning ordinances, including its special "adult" zoning ordinances. However, after it filed its applications, a nearby landowner announced his staunch opposition to such development, and he then quickly obtained a new certificate of occupancy from the City allowing him to use a small part of his existing commercial property as a so-called "classroom", i.e., a "school." A sham school was then established on the site, and 211 Alpine's permit application was then denied based on the existence of this so-called "school."

Because 211 Alpine Street is not a party in *City of Simi Valley v. Young*, the City of Los Angeles, appearing as amicus herein, was under no formal obligation to serve 211 Alpine Street contemporaneously with a copy of its amicus brief and did not do so. Consequently, and as noted above, 211 Alpine did not learn of this filing until Friday, December 29, 2000, when it chanced to discover this information. The City of Los Angeles did send a copy of its brief to undersigned counsel on that date, however, following a specific request to that effect by undersigned counsel.

Upon a quick reading of the amicus brief submitted by the City of Los Angeles in this case, it became apparent to 211 Alpine Street's counsel that the City's primary argument is that the Court of Appeals erred in addressing this "sensitive use veto" issue *on its face* rather than *as applied*. Los Angeles' primary theory seems to be that this type of circumstance occurs so rarely that there is no

justification for invocation of the First Amendment's substantial overbreadth doctrine but, instead, that such challenges should be brought only as applied.

Amicus, 211 Alpine Street, wishes to bring to this Court's attention that this circumstance is not at all unusual and that the very City which is attempting to persuade this Court that this litigation is aberrant and unique, has enforced its own adult zoning ordinance in this very same manner, and obviously wants to continue to do so in the future, all to the significant detriment of 211 Alpine Street and all similarly situated parties in the future.

Because 211 Alpine Street believes it is critical that the Court be apprised of this information before determining whether to grant or deny a petition for writ of certiorari in this case, and because 211 Alpine Street is informed that this matter is presently set for conference on Friday, January 5, 2001, 211 Alpine Street hereby moves this Court for an order granting it leave to file an amicus curiae brief out of time on behalf of respondent Philip Young.

Pursuant to Supreme Court Rule 37.2(a), 211 Alpine Street sought and obtained the consent of all the parties to this action to allow it to file a brief herein as amicus curiae. Unfortunately, because 211 Alpine Street did not learn of the circumstances necessitating its filing this amicus brief until Friday, December 29, 2000, attempts to obtain timely *written* consent of all counsel have been delayed. However, undersigned counsel will submit such

written consent notices to this Court shortly hereafter under separate cover.

DATED: January 2, 2001

Respectfully submitted,

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## INTEREST OF AMICUS[1]

Amicus 211 Alpine Street, LLC (hereafter simply "Alpine"), is a plaintiff in a lawsuit presently pending in the United States District Court for the Central District of California against the City of Los Angeles,[2] an amicus curiae herein. Alpine is presently locked in litigation with the City of Los Angeles under circumstances almost exactly identical to those presented in *City of Simi Valley v. Young*. Specifically, like the City of Simi Valley, the City of Los Angeles allows so-called "sensitive uses" which come into existence only *after* an adult business applicant has filed its relevant permit applications, to defeat the adult business' permit application. That is in fact what happened in the current district court litigation between Amicus 211 Alpine Street and the City of Los Angeles.

Specifically, 211 Alpine Street had filed building permit applications for a live entertainment adult business use, to operate at a property it had purchased at a cost of more than a million dollars. It had made this purchase only after carefully insuring compliance with all of the City's zoning ordinances, including its special "adult" zoning ordinances. However, after it filed its applications, a nearby landowner announced his staunch opposition to such development, and he then quickly obtained a new certificate of occupancy from the City allowing him

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[1] No counsel for a party in this action had any part whatsoever in the preparation or authorship of this amicus brief. The sole funding for this brief has come from Amicus Curiae 211 Alpine Street, L.L.C.

[2] *211 Alpine Street, LLC v. City of Los Angeles*, C.D. Cal. No. 00-8791 ER (AJWx).

to use a small part of his existing commercial property as a so-called "classroom", i.e., a "school." A sham school was then established on the site, and 211 Alpine's permit application was then denied based on the existence of this so-called "school."

In short, both in the pending district court case and here in *City of Simi Valley v. Young*, the so-called "sensitive use" is not a true arm's length "sensitive use" but, rather was created by a private citizen group solely for the purpose of defeating a pending adult business permit application. However, 211 Alpine Street's constitutional concerns would be no less great if the opposed private landowner had in fact established a *legitimate* school. The point is simply that the City's ordinance scheme allows applicants like 211 Alpine Street to be held hostage by the determined efforts of private citizens opposed to their use.

For these reasons, Alpine has a substantial interest in the outcome of this litigation, and believes it has a valuable perspective to present to this Court in connection with its decision whether to issue a writ of certiorari herein.

## BRIEF OF 211 ALPINE STREET, LLC, AS AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I

### THE CITY OF LOS ANGELES' AMICUS BRIEF INCORRECTLY DESCRIBES THE RULING OF THE COURT OF APPEALS

In its Amicus Brief (at p. 4), the City of Los Angeles seriously misstates the opinion of the Court of Appeals in this case. Specifically, the City states:

> "Second, the Court studiously ignored the impact of the pre-existing sensitive land use, the karate school, requiring the City to issue a concededly invalid permit."

The statement above is a total misreading of the opinion of the Court of Appeals. Contrary to the City's statement above, at no point did the Court of Appeals require the City to issue a permit to the plaintiff. Indeed, had that been the intention of the Court of Appeals, there would have been no reason for the court to then proceed to analyze the validity of the City's zoning restrictions. However, after finding the "sensitive use veto" feature facially unconstitutional, the Court of Appeals nonetheless proceeded to examine the constitutionality of the zoning ordinance. This was because the Court of Appeals recognized that the karate school was not an "after-arriving sensitive use" and, therefore, the court's invalidation of the "sensitive use veto" feature would not necessarily be dispositive of the plaintiff's permit application.

Indeed, given that the Court of Appeals *reversed* the District Court and *upheld* the city's zoning scheme in all respects other than the sensitive use veto feature, it is clear that, on remand, the karate school's continued existence would justify denial of the request for a permit.

However, the court's invalidation of the "sensitive use veto" feature was by no means an idle act. By virtue of the Court of Appeals' holding, respondent would be free to find another site within the city without fear that a private citizen opposed to his business could block his

opening at a proper site.[3] Indeed, as noted in the Response to Petition for Writ of Certiorari, the respondent testified that he would in fact seek another site in Simi Valley but for the fact that he is chilled from doing so by the ordinance's sensitive use veto feature.

The Court of Appeals' facial invalidation of the "sensitive use veto" feature not only benefited this respondent, it also fulfilled one of the most salutary purposes of the doctrine allowing facial challenges, i.e., protection of the public and of third parties not before the court against laws which unconstitutionally restrict First Amendment rights. By virtue of the Court of Appeals' decision, any future applicant attempting to locate an adult business in Simi Valley may do so, confident in the knowledge that if they comply with all the City's requirements, private citizen groups opposed to their use cannot cause them to lose their entire investment. For all these reasons, the Court of Appeals' resolution of this case was fully consistent with this Court's decisions regarding facial overbreadth challenges.

Moreover, the Court of Appeals' decision was also consistent with this Court's admonition in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), that federal courts should strike state laws only to the extent that they are unconstitutional, but no further. Rather than invalidating the *entirety* of Simi Valley's adult zoning restrictions, the Court of Appeals properly enjoined their enforcement only to the extent that the City might ever

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[3] Likewise, if it is found, on remand, that the karate school has gone out of business, the Court of Appeals' opinion would allow respondent to re-apply at *this* location.

again attempt to deny an adult business permit application solely on the basis of an after-arriving sensitive use.

In short, nothing about the Court of Appeals' unexceptional decision would warrant this Court's review.

## II

## CONTRARY TO THE ASSERTIONS IN THE CITY OF LOS ANGELES' AMICUS BRIEF, THE COURT OF APPEALS DID NOT IN ANY WAY MISAPPLY THE SUBSTANTIAL OVERBREADTH DOCTRINE

The City of Los Angeles' primary argument is that the Court of Appeals erred in addressing this "sensitive use veto" issue *on its face* rather than *as applied*. The City suggests that this ruling somehow violated the limitation on the substantial overbreadth doctrine which this Court articulated in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). However, nothing in the Court of Appeals' opinion remotely departs from this Court's substantial overbreadth holdings in *Broadrick* or *Taxpayers for Vincent*.

*Broadrick* and *Taxpayers for Vincent* both reaffirmed the special First Amendment doctrine allowing facial overbreadth challenges by a litigant whose own First Amendment rights are not being violated by the statute. So long as the litigant has Article III standing and is in fact adversely affected by the operation of the challenged statute, this Court allows such an individual to bring a facial First Amendment challenge to such a law. *See, e.g., Bigelow v. Virginia*, 421 U.S. 809, 815-816 (1975), and *New York v. Ferber*, 458 U.S. 747, 769 (1982).

The only limitation imposed on the substantial overbreadth doctrine by *Broadrick* and *Taxpayers for Vincent* is that in order to invoke this special First Amendment overbreadth standing, the party presenting this challenge must demonstrate that the overbreadth of the statute is "substantial" in comparison to its plainly legitimate sweep.

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that a child pornography statute could not be held facially invalid in all its applications merely because there were a very small number of instances where its application might be unconstitutional; however, *Ferber* recognized that the substantial overbreadth doctrine remains in full force and effect where there are statutes which are either "incapable of limitation" or which have "the potential to repeatedly chill the exercise of expressive activity by many individuals." 458 U.S. at 772.

The "sensitive use veto" aspect of petitioner's adult zoning scheme is unquestionably one which can and will repeatedly chill the exercise of expressive activity by most, if not all, future adult business entrepreneurs. The record below illustrates that it takes, at a minimum, many months to obtain all the requisite building permits and operating permits to construct an adult entertainment theatre featuring live entertainment, obviously with a substantial investment cost. (Amicus Alpine, for example, has expended well over a million dollars.) No reasonable entrepreneur, knowing that the establishment of any future site in Simi Valley will require great sums of money, great periods of time, and will be a target for any private citizen opposed to the business, would likely attempt to establish such a business in Simi Valley. In

other words, this is precisely the type of ordinance which will likely "repeatedly chill the exercise of expressive activity by many individuals." *Ferber*, 458 U.S. at 772. Consequently, the Court of Appeals' order of partial facial invalidation is perfectly consistent with the First Amendment substantial overbreadth doctrine as articulated by this Court in *Ferber*, *Broadrick* and *Taxpayers for Vincent*.

Even beyond this, however, the present record reflects that the respondent *himself* expects to benefit from the Court's condemnation of the sensitive use veto aspect of the City's adult zoning scheme. Accordingly, respondent does not even need to rely on this Court's "substantial overbreadth" doctrine, but instead, could and did assert the need for future protection of *his own* constitutional rights. As this Court noted in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503-504 (1985), it is unnecessary to invoke *Broadrick*'s substantial overbreadth doctrine where the challenged law has the potential to interfere with the appellees' *own* First Amendment rights.[4]

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[4] In *Brockett*, the plaintiff was an adult bookstore owner challenging a potentially overbroad definition of the term "prurient interest" in a state statutory ban on obscenity. Whereas the Court of Appeals had invalidated the obscenity statute in its entirety due to this defect, this Court held that the maximum remedy, if any, should be partial facial invalidation, i.e., invalidation of only a few portions of the definition of "prurient interest," while leaving the rest of the obscenity statute standing. However, this Court concluded that it was not necessary to invoke the substantial overbreadth doctrine, as the portion of the statute which was assertedly unconstitutional threatened the plaintiff's *own* future exercise of First Amendment rights. That is the same circumstance present here.

Here, as in *Brockett*, the chilling effect of the challenged portion of the law before the Court deters a litigant from exercise of his *own* First Amendment rights. Consequently, it was perfectly appropriate that the Court of Appeals "declared [the ordinance] invalid to the extent that it reache[d] too far, but otherwise left [it] intact." *Brockett*, 472 U.S. at 504.[5]

Finally, even if this *were* a situation where respondent had to rely exclusively upon the First Amendment's "substantial overbreadth doctrine" in order to qualify for relief, it would not be correct, as implied by amicus City of Los Angeles, that the challenged overbreadth is not "substantial." Los Angeles' primary theory seems to be that this type of circumstance occurs so rarely that there is no justification for invocation of the First Amendment's substantial overbreadth doctrine but, instead, that such challenges should be brought only as applied.

However, Alpine's own experience with Amicus City of Los Angeles demonstrates that this circumstance is not at all unusual, and that the very City which is attempting to persuade this Court that this litigation is aberrant and unique, has enforced its own adult zoning ordinance in this very same manner, and obviously wants to continue to do so in the future.

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[5] The Court of Appeals' partial facial invalidation could have been performed *either* under the substantial overbreadth doctrine, or by recognition of respondent's need to obtain prospective protection of his *own* First Amendment rights. Consequently, the basis chosen for standing here was inconsequential.

## III

## THE SUBSTANTIVE FIRST AMENDMENT PORTION OF THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT, NOR IS IT IN CONFLICT WITH ANY DECISIONS OF ANY STATE COURT OR ANY OF THE LOWER FEDERAL COURTS

Amicus City of Los Angeles also attacks the merits of the Court of Appeals' opinion under the First Amendment, but does not specify any conflict which would warrant issuance of this Court's Writ of Certiorari. Indeed, this is not surprising since this is a case of first impression.

Moreover, there was nothing erroneous or inconsistent about the First Amendment ruling embodied in the decision of the Court of Appeals below. This Court's decisions are replete with examples where rules or procedures inapplicable in other contexts nonetheless have been applied in First Amendment contexts as the only way of insuring the protection of rights which can easily be destroyed under the guise of content-neutral regulation. The rationale for special protections demanded by the First Amendment was perhaps best explained by this Court in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). In that case, this Court carefully noted the distinction between laws which require a permit only from those defined by the content of their expression, contrasted to laws of general application which are not aimed at conduct commonly associated with expression. *Id.* at 760-761.

What Amicus City of Los Angeles ignores is that the "sensitive use veto" exists *only* in the context of an ordinance which is specifically aimed predominately at expressive businesses.[6]

Because it is only, or primarily, businesses defined by their expression which are subject to Simi Valley's "sensitive use veto," it is only appropriate that the First Amendment was invoked to protect such businesses against this unique type of a threat to expression. The Court of Appeals' decision was simply a logical extension of this Court's determination in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), recognizing the First Amendment requirement that municipalities may not create special zoning schemes just for adult businesses if those schemes effectively deny them a "reasonable opportunity" to open and operate. *Id.* at 54.

In sum, the Court of Appeals' opinion is neither inconsistent with this Court's prior holdings, nor is it inconsistent with the decisions of any other federal courts to date, nor the decisions of any state court. In short,

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[6] In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court held that an adult business ordinance was subject to facial challenge under the First Amendment even though admittedly, not every regulated adult business was one which involved expressive activities. *See* 493 U.S. at 224. This Court explained that a facial challenge is nonetheless appropriate with respect to such ordinance schemes because they are more "onerous with respect to sexually oriented businesses than with respect to the vast majority of other businesses." *Id.* at 225.

there is simply no pressing reason for this Court to grant review in this case.

DATED: January 2, 2001

Respectfully submitted,

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